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ITLOS and fishing: an unfinished challenge of international protection for the coming years

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Abstract: The present work aims to investigate, incidentally, the relationship that exists between UNCLOS and fishing. With immediate way, we can see, that the UNCLOS, has not included from its birth articles, relevant for the protection of fishing as well as the law of the sea. The exploitation of biological resources is part of a "general" and not precise jurisprudence on the subject. It needs not only to resolve disputes between coastal states, but also to protect in a particular way the world of fishing and the marine environment and everything that is linked with the survival of fish and with the problems on biological resources.

Keywords: UNCLOS; protection of fishing; biological resources; part XV UNCLOS; ITLOS jurisprudence; EEZ; coastal state; conservation of biological resources.

Introduction

Talking about marine fisheries as well as of the relationship between fisheries and UNCLOS we do not reach precise conclusions. But we can talk about scenarios that put fisheries and its protection, due to the decrease and depletion of fish stocks, since the seventies and then, as a problem that needs further research. The problem of conservation, the guarantee of exploitation for economic profit, environmental needs, the exploitation of biological resources and the freedom of fishing of states in other seas are topics, that are discussed during the negotiations of the UNCLOS, trying to define a more concrete legal position (Churchill, 2018).

The continuous dynamics of evolution of a legal act of international order has the objective of defining and simultaneously highlighting the normative approaches, as well as the institutional structures of management tools, that are suitable for achieving the sustainability of marine resources, and fishing activities and their management, in a coherent manner, as the achievement of economic, social and environmental benefits. Fishing has to do with the industrial, commercial, environmental sector, food safety, protection of human rights, job safety, etc., interests that are part of the international community, which increasingly seeks to protect non-state subjects, such as individuals and multinational companies.

International rules and practice find their roots in a tension and conflict of interests. They try to offer a balance that leads to the integration and harmonization of the community as well as work to achieve greater safety and protection in this sector.

Marine scientific research and protection of the marine environment are not included in UNCLOS. It has not devoted articles relating to fisheries. The conservation of living marine resources are, however, considered as distinct subjects and regimes, namely the territorial sea, the archipelagic waters, the exclusive economic zone and the high seas. The living marine resources, in these zones, and the coastal state, are elements that belong to a different level of competence from the flag states for fishing vessels.

The Economic Exclusive Zone (EEZ) manages the control of fishing. The EEZ is under the responsibility of the coastal state, which enjoys sovereign rights for exploration and exploitation, conservation and management of living marine resources, according to art. 56, par. 1, letter a). It is the basis for the adoption of laws that have to do with the management of living marine resources. In addition, it covers numerous sectors and adopts executive and judicial measures, that are necessary for the guarantee and compliance with applicable laws, regulations. The sovereign rights of coastal states are also limited by the principle of rational management for fishery resources. They are

regulated by art. 61. The same holds with the obligations of responsibility and conservation of living marine resources in the EEZ. The coastal state guarantees the living resources of the EEZ. It adopts conservation measures of appropriate use to cooperate subregional, regional and global organizations.

The protection of living resources according to the UNCLOS is based on ecosystem approaches. The coastal state should protect marine resources from overexploitation as well as maintain and restore a population at levels that determine sustainable yield. A yield that takes into account environmental, economic factors as well as the interdependence of species.

Finding a balance between the individual interest concerning living resources in the sea and the general collective interest in the protection of resources guarantees for the coastal state the obligation to determine catches and establish the capacity for exploitation. It also authorizes for developing states an outlet to the sea for the same region and/or sub-region according to art. 62. In this way, international obligations and responsibility fall to a coastal state that demonstrates and does not ensure the protection, conservation of fishery resources that put sustainable maintenance at risk.

The conservation and exploitation of fishery resources require the coastal state and the flag states of fishing vessels to contribute to the conservation of fish species and optimal

management.

The guarantee of the system for the management of living resources for the seas and oceans is the mechanism for resolving disputes under Part XV of UNCLOS, that is, when it interprets and applies the rules on fisheries in the EEZ and on the high seas.

What is the jurisdiction in fisheries matters, Part XV UNCLOS?

The settlement of disputes in fisheries matters for states, is regulated in Part XV UNCLOS, that is, when the dispute interprets and applies the convention to resolve by peaceful means and according to art. 279 (Pröelss, 2017) a dispute without resorting to diplomatic means and proceeding with judicial mechanisms. The ITLOS, the ICJ, and/or an arbitral tribunal have been established according to the former Annex VII or VIII of Art. 286 (Pröelss, 2017).

The tribunal contained in the former Annex VII constitutes a mandatory mechanism for resolving disputes. According to what the parties of the convention have pre-established in Art. 287 (Pröelss, 2017), par. 5., such mandatory jurisdiction mechanism and the arbitral tribunal work (former Art. 297, par. 3, letter. a) UNCLOS) (Boyle, 1997; Mcdorman, 2003; Klein, 2005; Garcìa-Revillo, 2015; Serdy, 2017; Pröelss, 2017).

The general rule for disputes and their interpretation as well as the application of the provisions of the Convention on fisheries are contained in section 2 of Part XV. This rule provides for the automatic exclusion of jurisdictional mechanisms for disputes relating thereto and the sovereign rights of the coastal state for the living resources and the EEZ of its own exercise. The management of the quantities of catches are contained in art. 61. The fishing capacity, the allocation of surpluses by states, the terms and conditions establishing the laws and internal regulations of conservation and management are established in art. 62. The exception excludes the matter of fisheries in the exclusive EEZ within the scope of Part XV.

The interests of the states are satisfied as novelties, that constitute the EEZ and the role of the coastal state in the management of living resources, that preserve novelties in the risk of disputes and circumscribe the powers of each state involved as well as its own sovereignty.

Disputes are submitted to compulsory conciliation upon request of the parties according to Art. 297, par. 3, letter b) of Annex V UNCLOS. (Pröelss, 2017). Art. 1 challenges the coastal state to ensure the maintenance of living resources in the EEZ when it is not seriously threatened according to Art. 297, par. 3, letter b) and i) (Pröelss, 2017).

In an arbitrary manner, the catches that are admissible as well as the fish stock by another state, which wants to fish, Art. 297, par. 3, letter b), ii) (Pröelss, 2017), and which has refused to allocate to any state, art. 62, 69 and 70, part of the declared surplus, are defined according to Art. 297, par. 3, letter b), iii) (Pröelss, 2017). As an alternative was the narrow scope of coastal state behaviors that are not in accordance with the UNCLOS on living resources and the EEZ.

Art. 297, par. 3, lett. c) (Pröelss, 2017) excludes the conciliation commission that replaces the coastal state with the determination of the content of measures that have not adopted the violation of the UNCLOS.

The reports of the conciliation commissions are not binding for the states in dispute. The UNCLOS assigns a monitoring, screening and control value as well as provides for the competent international organizations according to Art. 297, par. 3, lett. d) (Pröelss, 2017).

Art. 297, par. 3 provides that agreements on access to fisheries in the EEZ, between coastal states and private parties, that are geographically disadvantaged to include parties that cannot otherwise decide measures, that reduce the risk of a conflict interpreting and applying such risk of presentation, are based on arts. 69 and 70.

The wording is varied and is in favor of measures that provide for and support compliance with dispute resolution mechanisms. And this is how fishing applies, from a jurisdictional point of view, in a mandatory manner and without exceptions, measures to settle disputes, relating to fishing activity in the EEZ, such as contesting the sovereign rights in the fishing sector of the coastal state and the fishing rights of third states contesting procedural obligations (Dunne, Polunin, Sand, Johnson, 2014; Colson, Vohrer, 2015; Appleby, 2015; Cottier, 2015; Kopela, 2017; Minas, Diamond, Doremus, 2018; Xu, 2019; Polanskaya, 2019; Mccorquodale, Robinson, Peart, 2020; Allen, 2020; Bordin, 2020; Gaver, 2021; Guilfoyle, 2021; Liakopoulos, 2021; Naldi, 2021)[1].

In contrast, the protection of the marine environment and its resources as well as the management of biological species, that are excluded from the rules of Part V UNCLOS on the EEZ, do not concern fishing. In other words, they are not part, as an exception, of art. 297, par. 3 (Pröelss, 2017). This is an exception to a general rule that is interpreted in a strict manner.

1Chagos marine protected area arbitration (Mauritius v. United Kingdom), award of 18 March 2015, par. 297, 300. Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, award of the arbitral tribunal, 11 April 2006, par. 283 and 384.

Advisory jurisdiction for fisheries under the ITLOS

For ITLOS is very difficult to adopt legal and consultative measures, which concern fisheries, since the convention does not mention Art. 288 UNCLOS (Pröelss, 2017). But the ITLOS can, as we have seen through the advisory opinion n. 21 of 2015, rely on Art. 21 of the statute. This is a provision which according to the ITLOS:

"(…) comprises all disputes and all applications submitted to it in accordance with this conventionn and all matters specifically provided for in any other agreement which confers jurisdiction over the tribunal (…)".

The logic of the ITLOS was to rely on the statute, which is an integral part of the UNCLOS, that is, of the same rank with the convention. And so art. 21 is not considered, according to Art. 288 UNCLOS (Pröelss, 2017), but in practice establishes a plan of an autonomous nature. The expressions used such as "all matters" and "toutes les fois que cela" are interpreted by the same article that uses the word "dispute/lite"[2].

The expressions used for disputes show and include the advisory opinions that are foreseen in any agreement, which confers jurisdiction on the ITLOS. The tribunal has specified that its jurisdiction of an advisory nature does not derive from the expression of art. 21: "all matters specifically provided for in any other agreement which confers jurisdiction on the tribunal". The agreement, thus, confers jurisdiction on the ITLOS. In other

2Advisory opinion no. 21, 2 April 2015, Request for an Advisory Opinion submitted by the Sub Regional Fisheries Commission (SRFC), par. 56: https://www.itlos.org/index.php?id=252

words, it is a consultative agreement that has a competent nature. It can be exercised whenever necessary. Moreover, art. 21 connects and constitutes the legal basis, in a substantial way, of the consultative jurisdiction of the ITLOS (Ndiay, 2010; Gao, 2012; Kateka, 2013; Tanaka, 2015; Ruys, Soete, 2016; Wood, 2018).

Regarding Art. 138 of the regulation of the ITLOS:

> "(…) the tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the tribunal (…)".

In other words, this article is not affirmed and is not based on the jurisdiction of the ITLOS. Instead, it is a rule that is subordinated by the spirit of the UNCLOS, playing at the same time a central role, which necessarily identifies the admissibility of a request for an advisory opinion. Thus, the possibility of asking the ITLOS for an advisory opinion is foreseen by an international agreement and the request is transmitted by a body not authorized by the agreement.

Fishing activities in the EEZ and obligations of the coastal state, third states, international organizations that are competent for fisheries matters

To give an interpretation regarding the obligations of the coastal state, third states and international organizations, that have the

relevant competence in fisheries management matters, we need the advisory opinion no. 21 of 2015, which constitutes an important basis for the future in fisheries matters. The opinion, as a balance of the EEZ between the role of the coastal state and the flag state concerning fishing vessels, is submitted to the scrutiny of the ITLOS, within the perspective of an illegal fishing activity, that does not declare and does not regulate fishing, i.e. as a vulnerability for the conservation of commercial fish species. The ITLOS provides interpretative guidance at a level that has as its main objective the effective functioning of rules that are relevant to the UNCLOS and agreements that have to do with fishing and the sustainability of fishery resources (Becker, 2015; Gao, 2015; Stephens, 2015; Lando, 2016; Schatz, 2016).

The relevant opinion of the Sub-Regional Fisheries Commission (SRFC), as a regional fisheries organization, includes seven West African states. With regard to illegal fishing, it does not regularly declare exclusive economic zones to its members, who consider that fishing industries reduce the amount of catch for regional populations. Thus, the request for an advisory opinion has to do with the definition of minimum conditions of access for the exploitation of fishery resources of the maritime, that are subject to the jurisdiction of the member states of the SFRC.

This opinion is based on Art. 33 of the MAC Convention[3], which provides for a certain legal question for the SFRC to have it. Thus, the ITLOS tries to address some interpretative issues that have as an obligation the flag state and the fishing activities, conducted within the EEZ exclusively by third states.

The flag state holds as responsible the fishing activities, which are conducted by vessels flying its flag. The fishing licence is issued through an international agreement concerning the flag state and the international agency. These are responsible for the violation of fisheries legislation and the coastal state by their fishing vessels. In this way, the rights and obligations of the coastal state ensure sustainable management for fish stocks. They are shared by a common interest and small pelagic species as well as those related to tuna according to advisory opinion no. 21, para. 2.

For the ITLOS and the UNCLOS the primary responsibility regarding the conservation and management of living resources in the EEZ and the coastal state, falls to the flag states, which have the responsibility to ensure that fishing vessels do not conduct fishing activities in the exclusive economic zones of others. Thus, the coastal state has the responsibility to determine the level of catches that have to do with fishing in the EZZ. It,

3Convention on the Determination of Minimum Conditions for Access to and Exploitation of Marine Resources in Marine Areas Under the Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, 2012: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:067:0003:0028:EN:PDF

also, ensures in an appropriate manner conservation and management measures for the maintenance of resources that live in the EEZ and that are not endangered by overexploitation.

According to Art. 72, par. 2 UNCLOS, the coastal state, through agreements and memorandum of understandings, grants other states access to a surplus of catches. The related responsibility falls on the coastal state, which keeps and adopts the laws and regulations relating thereto, including the application procedures which are also consistent with the UNCLOS, according to Art. 72, par. 4 UNCLOS (Pröelss, 2017).

Also, the guarantee and respect of the laws and regulations, which are related to the conservation measures and management of living resources falls on the coastal state, according to Art. 73, par. 1 UNCLOS. In other words, the coastal state adopts measures such as inspection, boarding, arrest, judicial proceedings, which thus guarantee the laws, regulations adopted according to the UNCLOS.

With regard to the flag state, the ITLOS considers that its responsibilities that are in conflict with IUU fishing, as well as the relative silence from the UNCLOS, allow precise, general obligations, subsisting with the convention for the sector of conservation, management of living marine resources. These are obligations that are part of bilateral agreements on access to fishing concluded between coastal and flag states.

The flag state as a general obligation for the EEZ is guaranteed according to art. 58, par. 3 and 62, par. 4. The same applies to vessels flying its flag. Thus, the principle of exclusive jurisdiction for the flag and the vessels as well as the general obligations that arise from the granting of the flag, according to art. 94, concern fishing activity, the flag state and its responsibility to exercise jurisdiction, control, effective management in administrative matters and adoption of necessary measures that guarantee flag vessels, that involve and compromise obligations, that guarantee and conserve the management of living marine resources. The relevant flag status violations are further investigated. As a consequence of this, necessary actions are then taken to remedy the relevant situation.

These obligations are connected with the regime of the EEZ, since it takes into account the rights, duties of the coastal state and complies with laws, regulations, that are adopted in accordance with the provisions of the UNCLOS and other norms of international law, according to art. 59, par. 3.

The citizens of the state fishing in the EEZ comply with the relevant conservation measures and the conditions established by laws, regulations for the coastal state, according to art. 62, par. 4. Measures are adopted for the protection of its citizens and vessels flying its flag and engaging in fishing activities,

according to the provisions for the flag state. Thus, the obligation of diligence is not connected with the flag state. Instead, this adopts measures necessary for the enforcement. Such measures, ensure compliance that prevents fishing by fishing vessels and its flag in other exclusive economic zones. The flag state is not obliged to require vessels flying its flag not to fish in EEZs. This means that the flag state violates the duty of care, that is, to take the necessary measures and prevents fishing when vessels flying its flag.

Violating the rules and regulations of the flag state, for private individuals, is not attributable to the flag state, and its liability complies with the obligations of diligence that are burdensome. Thus, the flag state is exempt from the responsibility to adopt the measures that are necessary to fulfill this type of obligations.

The ITLOS has not specified that the standard of diligence is not soft in nature, but with a unique, rigorous way for the flag states and with an independent way, brings their respective capacities.

It is a discretion that the flag state establishes and brings laws, regulations and measures that contemplate control mechanisms to guarantee the pre-established laws and regulations. The sanctions applicable to fishing activity must contain with sufficient way the violations to deprive the violators of the benefits that come from it.

The due diligence is strictly and precisely connected with the

competent organizations in the field of fisheries. Thus, the international organization with exclusive competence in the field of fisheries concludes agreements on access to fishing with a coastal state that manages the vessels flying under its flag. In other words, the international organization guarantees for the member states of the EEZ that comply with laws, regulations and rules the related conduct of fishing activity. Every international organization carries an obligation, for the fulfillment of these rules, which depends on the behavior of the member states. Conclusively, the international organization is held responsible for violations of obligations that arise from an access agreement that concerns fishing and not the member states of the EEZ.

The consultative opinion highlights aspects that concern state responsibility in fisheries. Thus, the qualification of a duty of diligence as a substantive, procedural obligation does not exhaust the adoption of laws, that are necessary for the control of measures, that have to do with flag vessels.

The control that respects national rules for fishing vessels, according to due diligence, allows to accept the violation by the flag state. Such opinion defines a role for the flag state that is connected with the responsible flag and thus highlights an exclusive jurisdiction for the flag state and its vessels that engage in fishing activity in the EEZ of others. In this way, the

function of sovereign powers for the coastal state, which manages the biological resources in the EEZ, is confirmed.

Protecting offshore bunkering by foreign fishing vessels in the EEZ. What powers does the coastal state have?

The contentious cases of the ITLOS are indirectly and object-related to the exercise of sovereign powers, namely the management and conservation of fisheries resources by the coastal state that respects the conduct of an EEZ by foreign vessels. Thus, the related activities are not fishing but are connected to and in conflict with a fishing regime in an EEZ and/or in the high seas and are based on requests for precautionary measures and release (Churchill, 2007).

We have only one case where the dispute concerns precise obligations and directly the management and conservation of marine biological resources. This is the Chile v. European Union case, namely the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, which aimed to resolve the failure that was brought by Chile and the EU in the conservation obligations imposed by the UNCLOS and especially in the fishing of swordfish, that came from Spanish vessels in the high seas, adjacent to the marine spaces of Chile.

The chamber of the ITLOS did not take a precise position for the parties that resolved the relative dispute through diplomatic channels, which were concluded with an agreement in 2008 and in 2009, as a proceeding that was extinguished (Stoll, Vöneky, 2002)[4].

In other cases the ITLOS has tried to take a stand for fishing and the related powers of the coastal state according to art. 56 and the freedom enjoyed by third states in the EEZ according to art. 58, par. 1. Problems of interpretation are posed to the list of non-exhaustive freedoms including also: "internationally lawful uses of the sea related to these freedoms". According to Art. 62, par. 4 UNCLOS the citizens of other states fishing in the relevant EEZ:

"(…) conservation measures with the other terms and conditions established in the laws and regulations of the coastal state. These laws and regulations shall be consistent with this Convention and may relates, inter alia (…)".

The relevant list includes eleven matters, for which the coastal state adopts laws, regulations among which is included off shore bunkering.

The M/V Saiga, Prompt Release (St Vincent and the Grenadines v. Guinea) and M/V "Virginia G" (Panama v. Guinea Bissau) cases are recalled, as a broad interpretation of the coastal state's

4The dispute between EU and Chile had been going back and forth for about ten years, especially regarding fishing of swordfish within the scope of the WTO. The dispute was inspired by the relative compatibility of Chilean legislation that prohibited the landing of swordfish in the ports of Chile by the GATT of 1994. So the dispute was resolved through a relative agreement with the parties and the suspension of the relative panel and the cancellation of the role after the relative request that was requested from 2009.

competences in the management of living resources at sea. In the M/V Saiga case, the ITLOS in an obiter dicta affirmed the relative refueling for fuel and its ancillary nature respecting the vessel providing offshore bunkering on a regular basis to the coastal state, within the limits for the exercise of sovereign rights and the activities of a vessel concerning the exploitation, management, conservation of living resources in the EEZ, according to art. 56. The court did not exclude the basis of the bunkering at sea, as a classification of an activity independent of a legal regime, such as that relating to freedom of navigation, according to art. 59.

For ITLOS, the EEZ states that have not adopted the relevant bunkering rules, can be considered according to the fact that they do not consider fishing activities in a related manner. This position thus adduces the non-inclusion of bunkering at sea and the related list according to Art. 62, par. 4 of the Convention. Therefore, the laws and regulations of a coastal state are part and refer to this article.

The M/V “Virginia G” case is part of an argument that concerns the coastal state that tries to manage, screen, control a direct connection with fishing, according to Art. 62, par. 4, for the ITLOS. It is a connection that is part of the off-shore bunkering for foreign vessels fishing outside the EEZ, allowing a continuous activity without further interruptions.

The ITLOS regulates part of the coastal state in the off-shore bunkering for foreign vessels fishing in the EEZ, that is, part of the measures that the state adopts to conserve and manage fishery resources. The logic of the ITLOS is managed through art. 56 that concerns the term “conserving” as well as the term “managing”, thus indicating the rights of the coastal state that are involved with conservation in the strict sense.

The ITLOS states that the list of activities according to art. 62, par. 4 and the activities regulated by a coastal state have to do with a direct connection with fishing. In a different way the case of bunkering at sea and fishing vessels allow continuous fishing. The ITLOS thus refers to international agreements in the fisheries sector, which reaffirms the close connection between fishing and the support that includes bunkering.

The competence of the coastal state refers to bunkering at sea, since the ITLOS emphasizes, that foreign vessels, are engaged in fishing in the EEZ, that is, an activity that is regulated by the coastal state that is concerned. It does not apply to other activities outside of bunkering unless it has been established by the UNCLOS (Franckx, Gautier, 2010; Anderson, 2017; Peiris, 2021).

The ITLOS, thus, establishes that the vessel Virginia G carries out bunkering operations without the relevant authorization, considering that the confiscation of the vessel is in principle

with a sanction that is admissible according to Art. 73 UNCLOS and does not satisfy other circumstances, such as that the vessel has not violated the laws of the Guinea-Bissau.

Conserving the living resources of the high seas and precautionary measures

The prescription of precautionary measures, which are mandatory for a dispute, according to Art. 290, par. 1 UNCLOS, is based on part XV of the UNCLOS. Art. 290, par. 5 prescribes provisional measures, i.e. those of the constitution of the arbitral tribunal, according to the former Annex VII, which is invested with the dispute. Thus, precautionary measures have to do with the exercise of jurisdiction by the arbitral tribunal, which does not constitute and which is not functioning.

This tribunal is not binding on the decision of the ITLOS, which according to art. 290, par. 5 modifies and maintains the order of precautionary measures that are issued (Mensah, 2002). Jurisdiction also in an incidental manner protects living marine resources. As we have seen in Southern Bluefin Tuna (Australia and New Zealand v. Japan) case, the dispute is related to an experimental fishing program for Japan concerning southern bluefin tuna (Kwiatkowska, 2000)[5].

The parties to the dispute have unilaterally submitted the matter

5Order of 27 August 1999.

to an arbitral tribunal, according to Annex VII UNCLOS, thus accusing Japan of violating its fishing rights on the high seas and its obligations of conservation and cooperation for the conservation of marine resources of the high seas, which are set out in Articles 64, 116, 117 and 119 UNCLOS. Thus, the ITLOS has brought into evidence provisional measures under art. 290, par. 5, through the constitution of the arbitral tribunal.

The ITLOS subsists to its prima facie jurisdiction as well as to the precautionary measures that go beyond that requested by the countries in dispute, namely Australia and New Zealand. The ITLOS asked Japan to refrain from the relevant authorization and to conduct the experimental fishing activity without the relevant agreement.

The relevant negotiation was made in good faith with measures that concern the conservation and admissibility of catches of bluefin tuna with respect to maintaining the tuna stock at levels that are capable of producing and guaranteeing their citizens a quantity that does not exceed national allocations. Thus, the catches are limited to a fishing campaign that the national quota agrees in competent international bodies. Therefore, the ITLOS states in paragraph 90 that:

"(…) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal (…)".

These modalities do not concern the South Pacific, which in general way asks the states to act and avoid disputes in order to

protect the southern bluefin tuna. The precautionary measures, that are prescribed in the ITLOS, are revoked by the arbitral tribunal according to the former Annex VII, also claiming the relative non-jurisdiction for the dispute. Thus, the precautionary measures from the ITLOS, state that:

"(…) the recourse to ITLOS that gave rise to them-as well as the consequential proceedings before this tribunal, have had an impact: not merely in the suspension of Japan's unilateral experimental fishing program during the period that the order was in force, but on the perspectives and actions of the parties (…)" (Boyle, Evans, 2001)[6].

Release of fishing vessels, fishing activities in the EEZ and powers of the coastal state

The right of coastal state allows the application of laws to vessels of any nationality that are engaged in fishing in the EEZ. The authorities of the coastal state for boarding stop, inspect and also initiating administrative and judicial proceedings against foreign-flagged vessels and their crews, that are suspected of practicing illegal fishing in the EEZ.

The balance of rights and interests for the coastal state and the flag state is based on the Convention, that imposes limits on the powers of the coastal state. Thus, art. 73, par. 2 establishes that a state that has seized a foreign vessel for alleged illegal fishing in the EEZ, releases the vessel that is seized and considers the amount of the bail unreasonable according to Art. 292, par. 1

6Decision of 4 August 2000, Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), par. 67, in Reports of International Arbitral Awards, vol. XXIII, p. 1 ss: https://www.itlos.org/en/main/cases/list-of-cases/case-no-3-4/

UNCLOS. Furthermore, it allows the flag state to request the relative release for the vessel and to apply to the relevant court to resolve the dispute.

This provision has as its objective the interest of the flag state, the vessel and its crew that leaves promptly the state, that carried out the relative seizure, and having the captain appear before the judges and pay the fine.

Articles 220, par. 6 and 7 and 226 UNCLOS regarding pollution by ships try to balance the jurisdiction of the coastal state regarding the protection of the marine environment in an EEZ with the right of the flag state and the freedom of navigation of the same area. Each provision allows for administrative and judicial proceedings, that are part of the seizure of a ship, certain circumstances. When compliance with obligations is ensured, which are related to the payment of a bail and the financial guarantee, the coastal state authorizes the ship to continue its voyage. This is a non-incidental procedure that is presented in an original way in the M/V Saiga, prompt release case (Treves, 1996; Trevisanut, 2012)[7].

In this way, the dispute is activated, in the legal sense, between the coastal and the flag state. According to art. 292, par. 3, the competent court rules on various matters that are related to

7Sentence of 4 December 1997, M/V Saiga, (Saint Vincent and the Grenadines v. Guinea), par. 50: https://www.itlos.org/fileadmin/itlos/documents/cases/1/C1-J-4_Dec_97.pdf

issues of release for the vessel and its crew and does not prejudice any cases that are pending before a national forum and/or an international judge. Thus, the ITLOS has as its subject to examine and check the bail that is set by the detaining state in a logical manner. The ITLOS does not establish whether the vessel has violated the laws of the coastal state, which are applied to the vessel in the spirit of international law. The issues are also resolved by other procedures.

The procedure of release, as a form of diplomatic protection, that the state uses on behalf of a vessel of its nationality, differs from traditional diplomatic protection, which requires the obligation of a prior exhaustion of national remedies[8].

The release cases, that are submitted to the Tribunal, are based on the violation of laws and regulations, that are related to fishing by foreign fishing vessels in the EEZ. Obviously as the only exception the M/V "Heroic Idun" Prompt release (Marshall Islands v. Equatorial Guinea) case, has erased the role of the request for release of the parties.

The fishing activities and the interpretative uncertainties apply to the regime of conservation and management of resources that are living in the sea in this area. The ITLOS considered that the matter and the bail was not released (Oxman, 2008; Tanaka,

8Sentence of 7 February 2000, case Camouco (Panama v. France), parr. 57-58: https://www.itlos.org/en/main/cases/list-of-cases/case-no-5/

2023)[9].

The seizure of fishing vessel and arrest of crew are related to illegal fishing activity. In the Hoshinmaru case (Japan v. Russia) the fishing vessel is in possession of a fishing license that authorized the EEZ of Russia at the time that the judicial authorities of this state consider that the rules on monitoring of catches, as a tool for the management of living marine resources, are not applied (Cogliati-Bantz, 2009; Hosono, 2009)[10]. Thus, the court decided the bail for the holding state that did not have a stabilization (Le Floch, 2018; Chandraskekhara Rao, Gautier, 2018)[11]. It assessed the amount of bail for the national judges. Otherwise a new lower bail is established.

Thus, in its judgment of 7 February 2000, the Camouco case (Panama v. France), the ITLOS found that the financial

9Case Chaisiri Reefer 2 (Panama v. Yemen, 2001): https://www.itlos.org/en/main/cases/list-of-cases/case-no-9/ the request for release was withdrawn and discussed. In the case Grand Prince (Belize v. France, 2001): https://www.itlos.org/index.php?id=100 the ITLOS deprived jurisdiction. In the case Tomimaru (Japan v. Russia, 2007): https://www.itlos.org/en/main/cases/list-of-cases/case-no-15/ it concluded that the related request was devoid of purpose.

10Sentence of 6 August 2007, Committee on the Elimination of Discrimination against Women. Thirty-ninth session, 23 July-10 August 2007, Goekce v. Austria, parr. 98 and 99: https://www.worldcourts.com/cedaw/eng/decisions/2007.08.06_Goekce_v_Austria.htm

11In the case M/V Saiga, Prompt Release, the bail was based on the diesel which was discharged from the seized vessel and on the part of the local authorities. In the relevant judgment of 18 December 2004 and in the case Juno Trader (Saint Vincent v. Guinea-Bissau), the Court did not provide us with relevant indications, factors which were related to the determination of the bail.

guarantee for the French judges was unreasonable and set a lower guarantee from the pre-established one of 20 million French francs to a bank guarantee of 8 million French francs taking into account that the fish on board was confiscated by the French authorities and sold by auction. The judgment of 8 December 2000 in the Monte Confurco case (Seychelles v. France) was based on the finding of the unreasonableness of a certain bail by the French judges. Thus, the ITLOS set the bail at a different amount bringing the value of the fish on board by the French authorities which is sold by auction. The ITLOS, also, concluded the bail route in its judgment of 23 December 2002 in the Volga case (Russia v. Australia). Furthermore, through the judgment of 6 August 2007, in the Hoshinmaur case, it was highlighted in a different way the bailment of a bank guarantee.

Conclusions

From what we have understood from the previous paragraphs is that the relevant jurisprudence of the ITLOS was varied in the matter of fishing. The ITLOS has tried to address through a general dispute the management of living biological resources in the sea, and various other perspectives, thus, allowing contributions, that have a precise interpretative nature and develop sectors that in any case are subjected.

The jurisprudence of the ITLOS also takes into account the

relevant matter that is under investigation, namely boundaries in the matter of fishing that are calculated in a fragmented way.

From a procedural point of view, the advisory opinion is also developed for the dispute that requests provisional measures in cases of release that fragment the obligations of the coastal and flag state of fishing vessels, that respect the management, and conservation of fish species in the EEZ.

This is a discriminating basis between activities that are subjected to powers of the coastal state in the matter of fishing, thus, determining the bail for seizure of fishing vessels and crews to a new determination. The logic is consistent and precise for the conservation, management of living biological resources in the seas.

In sum, this logic is not interpreted according to a bilateral vision of the relations between states but as a general interest for the states that protect the resources, that share the sustainable exploitation and the work done by the ITLOS, that in the coming years will be a challenge for the fishing sector.

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